$5,000,000 purchase price when it bought its BAR stock; and

(3) Amoskeag purchased its BAR stock long after the alleged wrongs to the corporate plaintiffs occurred and suffered no injury from the acts complained of.

On the basis of these undisputed facts showing no injury to Amoskeag, the District Court dismissed the suit. In the District Court's view, the action was in reality a suit by Amoskeag to recover back the full $5,000,000 it had paid to Bangor Punta, plus an additional $2,000,000 windfall, while still keeping the BAR stock. The District Court assayed the suit as follows:

"... [L]ooking at the substance of the action, it is evident that the real party in interest is Amoskeag, the present owner of over 99% of the outstanding BAR shares. And having purchased the stock of BAR from Bangor Punta in 1969, long after the events complained of occurred, Amoskeag is clearly attempting, by having the corporations which it controls bring the action in their names, to recover the full $5,000,000 consideration paid to Bangor Punta for the BAR shares, plus $2,000,000 more, while still keeping the BAR shares. Amoskeag does not claim that it was deceived or defrauded by Bangor Punta when it purchased its BAR stock, or that it did not get full value for its purchase price. Nor do plaintiffs claim to bring this action on behalf of any creditors or in the public interest. It would accordingly be contrary to settled equitable principles to permit Amoskeag, by thus using the corporate fiction, to acquire a windfall for any past misbehavior on the part of Bangor Punta during the period when Amoskeag had no interest in BAR and sustained no injury, direct or indirect, as a result of Bangor Punta's alleged improper acts." (App. 33)

In holding that the suit could not be maintained, the District Court noted that Amoskeag could not have brought

a derivative action on behalf of BAR for wrongs alleged to have occurred before it bought its shares (App. 33-34)* and held that Amoskeag could not, by causing the corporation to bring suit, accomplish indirectly what it could not do directly. The applicable principle, the court stated, was first enunciated by Dean (then Commissioner) Roscoe Pound in the leading case of *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 93 N.W. 1024 (1903), wherein he held that " 'If (shareholders) have no standing in equity to entitle them to the relief sought for their benefit, they cannot obtain such relief through the corporation or in its own name.' " (App. 36) The District Court stated that research had uncovered no case holding to the contrary (App. 39), and cited state and federal decisions denying corporate claims because shareholders had purchased their stock subsequent to the alleged wrongs. (App. 37-39)

On August 3, 1973 the Court of Appeals for the First Circuit reversed the District Court's decision. The First Circuit recognized that Amoskeag suffered no injury and did not question the general validity of the equitable principles applied below. (App. 57-58) It nonetheless reversed the District Court because BAR, the nominal plaintiff, was a railroad which the court termed a "public or a quasi-public corporation". (App. 61) The opinion stated that because of the nature of the services railroads provide, the public had an "identifiable interest" in their financial health and stated that this "public interest in the financial health of BAR provided a separate interest, quite apart from Amoskeag's, which was served by the corporate cause of action." (App. 60) Holding that the "separate interest" of the public permitted Amoskeag, through the instrument of the corporate plaintiffs, to bring a suit which would

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* Such a suit, the court held, was barred both by the contemporaneous share ownership requirement written into FRCP 23.1 which was uncontradicted by Maine law, and the rule that a subsequent shareholder cannot sue where he acquired his stock from the alleged wrongdoer. (App. 34)

otherwise be barred, the First Circuit stated the basis of its decision as follows:

> "We see BAR and its management as seeking a corporate recovery in which the public has a real, if inchoate interest. Amoskeag's windfall is irrelevant to that interest, and should not be the factor which determines whether or not BAR may sue." (App. 65)

Although the court below held that a presumed public benefit was the sole basis for permitting the suit to be maintained, the opinion conceded that it was doubtful the public would actually receive any benefits from a recovery by BAR. Specifically, the First Circuit recognized the obvious, that any recovery might be lawfully "syphon(ed) off . . . into the pockets of present shareholders" through a dividend distribution. (App. 66)

With respect to this possibility, the opinion could only suggest that the District Court might attempt to issue an order preventing distribution. It expressed doubt, however, that the District Court had the power to enter such an order, and specifically held that the ruling that plaintiffs could sue was not conditioned on the devising of any judicially imposed limitations on the uses of any recovery. (App. 66-67) The stated *raison d'être* of the action was thus recognized by the First Circuit to be unattainable.

Argument

I.

The Decision Below Disregards the Fundamental Principle That a Litigant That Has Itself Suffered No Injury Lacks Standing to Bring an Action to Vindicate the Rights of the Public.

The *ratio decidendi* of the First Circuit's decision is that the action herein, although not maintainable as a strictly private action, is maintainable as an action to enforce the public's interest in the "financial health" of a railroad

The Court asserted that the public has an "identifiable interest" in the financial ability of railroads to provide services and that this public interest provided "a separate interest, quite apart from Amoskeag's," served by the action. The Court viewed the plaintiffs before it as suing to protect this public interest, and on this basis held that equitable principles which otherwise would have barred the action were inapplicable. (App. 60)

Point II, *infra,* discusses the nature of the public's interest in railroads and demonstrates that the courts have never recognized a right in the general public to maintain an action of the type here presented. It is clear, however, that even if the public right assumed by the First Circuit did exist, Amoskeag would not have standing to assert it.

The starting point of any consideration of standing in the instant case is the undisputed fact that the real plaintiff and party in interest suffered no injury as a result of the acts upon which suit is brought. Having purchased its BAR stock after the alleged wrongs occurred, and having concededly received full value for its purchase price, the claims of Amoskeag here show not only no injury to a legally protected interest, but also no injury in fact.

This Court has recently greatly liberalized the law of standing in the context of suits to review governmental actions. In *Data Processing Service* v. *Camp,* 397 U.S. 150 (1970), and *Barlow v. Collins,* 397 U.S. 159 (1970), the Court replaced the "legal interest" test with a two-step inquiry involving a determination: (1) whether the plaintiff alleges injury in fact, economic or otherwise; and (2) if injury is alleged, whether the interest sought to be protected by the plaintiff is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. The first step—the injury in fact test—was stated to be grounded in article III of the Constitution, which restricts federal jurisdiction to "cases and controversies." *Barlow* v. *Collins, supra,* at pp. 170-171 (Brennan, J., concurring).

Even in the context of the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, however, which specifically provides for judicial review, this Court has insisted that the party seeking judicial intervention be himself among the injured before a federal court will take jurisdiction. In *Sierra Club v. Morton*, 405 U.S. 727 (1972), this Court drew a critical distinction between standing to bring an action and standing to assert the rights of the public once the action is properly initiated. To commence a proceeding, this Court there held, a litigant "must himself have suffered an injury." 405 U.S. at 738. The interests of the public can be argued only in support of the claim for relief; not to confer standing on a litigant who is himself uninjured. 405 U.S. at 737.

The decision below disregards the principles enunciated in *Sierra*. As in *Sierra*, a party that has itself suffered no injury, Amoskeag, has caused an action to be brought. Also as in *Sierra*, the lack of personal injury is sought to be remedied by assertions of an assumed public injury. The teaching of *Sierra*, however, is that any such assertions of the public interest may be heard only in support of claims of a party already properly in court. Injury to the public may not be used as a bootstrap to confer standing on a litigant otherwise barred from bringing suit.

The abandonment of the injury in fact test in the case at bar has much more serious implications than it would have had in *Sierra*. The number of persons who would wish to bring an environmental suit in which no monetary relief is sought is arguably limited; erosion of standing requirements for such actions might therefore have had a limited impact. The instant case, however, is a damage action, in which a court has accorded standing to an uninjured litigant to sue to obtain a $7,000,000 windfall. Although the number of persons interested in bringing environmental suits may be limited, the number of persons interested in obtaining a $7,000,000 windfall surely is not. The First Circuit's ero-

sion of standing requirements to bring damage actions invites a flood of new cases and litigants of unprecedented proportions.

The problems inherent in the abandonment of injury as a requisite of standing to bring damage actions go beyond judicial economy, however. Equitable relief is often indivisible, in that while a party may obtain equitable relief for himself, the relief necessarily benefits others as well. Where monetary recovery is sought, the situation is otherwise. If an uninjured party is given standing to bring a damage action for injuries to a third party, the effect is to give to one person a recovery that properly should go to others, or alternatively to permit double recovery. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261 (1972).

The instant case illustrates the point. The First Circuit's decision would permit Amoskeag, an uninjured party, to bring an action because of an alleged injury to the general public. The court below recognized, however, that Amoskeag might distribute any recovery to itself, thus preventing any application of the recovery for the benefit of the public. (App. 66) The most likely result of a litigation assertedly permitted to be maintained solely to benefit the public is no public benefit whatever.

Thus, Amoskeag does not meet a basic criterion that has been applied by this Court in determining questions of standing, *viz.*: whether "the party whose standing is challenged will adequately represent the interests he asserts." *Sierra Club v. Morton, supra*, at 758 (Blackmun, J., dissenting). Manifestly, Amoskeag, a private corporation whose duty to its shareholders requires it to make the maximum profit from BAR, cannot be an adequate representative of the public. If there is a public interest which can form a basis for the instant action, Amoskeag is not the proper entity to champion it.

The First Circuit brushed aside the inherent antagonism between Amoskeag and the public and the likelihood that the public would receive no benefit from any recovery by reference to a more general public interest which it saw as

served by the litigation. Referring to this Court's decisions in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), and *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), the opinion stated that the acts complained of "were so clearly violative of state and federal policies . . . as to invite the encouragement of private lawsuits as a supplement to public enforcement." (App. 65)

It is respectfully submitted that nothing in *Borak* or *Perma Life* sanctions the decision reached by the First Circuit. In *Borak*, this Court implied a private right of action in favor of a plaintiff who unquestionably alleged injury and was clearly the object of statutory protection. Similarly, in *Perma Life* this Court again held that a plaintiff who was unquestionably injured should not be barred from suing for damages by a *pari delicto* defense. In both cases, the private litigation which was seen as a supplement to public enforcement was litigation by a party who was actually injured.

The decision below enunciates a different doctrine. In the interest of supplementing public enforcement, the First Circuit would permit anyone, whether injured or not, to bring suit, the sole criterion being the willingness of the party to bring suit, "whoever it may be and whatever its private aims." (App. 65) In effect, the holding eliminates all standing requirements in suits which arguably supplement public enforcement.

Whether as a matter of constitutional limitation or judicial self-restraint, this court has consistently held that injury is the touchstone of standing. Just last term this Court stated that changes in the law of standing over the past ten years have not altered the requirement that "at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury before a federal court may assume jurisdiction." *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973). The Court reiterated the principle this term in *O'Shea v. Littleton*, 42 U.S.L.W. 4139, 4141 (U.S. Sup. Ct. January 15, 1974),

where it stated that the requisite personal injury must be "real" and "direct," and could not be "conjectural," "hypothetical" or "abstract."

The decision below is contrary to the foregoing principle, and disregards all prior precedents in the federal courts.* Unless fundamental limitations on federal standing heretofore uniformly imposed are to be disregarded, the decision must be reversed and the judgment of the District Court reinstated.

II.

The Decision Below Creates a New Public Right of Action Unsanctioned by Common Law or Statute and Based on a Totally Speculative Injury.

As pointed out in the Statement of the Case, *supra*, the First Circuit agreed with the District Court that Amoskeag had no interest of its own which would justify maintenance of the action (App. 59-60). The holding of the First Circuit was that it was the public's interest in the financial health of the railroad, described as a "separate interest, quite apart from Amoskeag's" (App. 60), that permitted the action to be maintained. The Court below saw this public interest as an independent basis for the action, and Amoskeag as an appropriate champion of it.

The foregoing holding — that a presumed public interest in the financial health of "public" or "quasi-public" corporations provides a basis for maintenance of a private damage action — has far reaching implications. In this case the First Circuit permitted Amoskeag to champion the presumed public interest, but the rationale that here permits Amoskeag to sue requires recognition of the right of

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* Professor Kenneth Davis, a leading commentator on standing has written:

"Even though the past law of standing is so cluttered and confused that almost every proposition has some exception, the federal courts have consistently adhered to one major proposition without exception: One who has no interest of his own at stake always lacks standing." K. Davis, Administrative Law Text pp. 428-429 (3d ed. 1972.)

a member of the general public to institute suit directly. If the First Circuit is correct that the public has a legally protected interest in the financial health of a railroad, federal courts must entertain suits brought directly by the protected class to enforce its rights. *Cf. Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971); *J. I. Case v. Borak, supra.* A substantial public right cannot depend for its vindication on the willingness of private shareholders or corporate management—groups normally antagonistic to the public—to bring suit.

The decision has particularly broad implications because of the statutes involved. Plaintiffs claim in the first instance for corporate waste and mismanagement, but they also seek recovery under the Clayton Act and the Securities Exchange Act of 1934. In recognizing the public interest as a basis for suit in the instant case, the First Circuit has necessarily opened the way for damage actions by the public *qua* public under the federal antitrust and securities laws, as well as the common law.

No precedent for the action is found in the common law. Management and directors of a corporation are answerable under the common law only to the corporation's shareholders, and only the corporation or its shareholders have the right to bring an action to indemnify the corporation for corporate waste and mismanagement. The derivative action, which is the instrument developed by the common law to protect shareholders, may only be brought by shareholders, and it specifically contemplates an action for injury to their interests, not those of the public. H. Henn, Law of Corporations § 358 (2nd ed. 1970).

Similarly, no precedent for the instant action can be found in the federal antitrust or securities statutes under which Plaintiff-respondents sue. With respect to the antitrust laws, the courts have uniformly held that only those who are the direct targets of violations, or who have been directly harmed thereby, may recover. *See Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 315 F.2d 564 (7th Cir. 1963), *cert. denied sub nom. Illinois v. Commonwealth Edison Co.*, 375 U.S. 385 (1963); *Productive Inventions,*

Inc. v. Trico Products Corp. 224 F.2d 678, 679 (2nd Cir. 1955), *cert. denied,* 350 U.S. 936 (1956); *Billy Baxter, Inc. v. Coca-Cola Co.,* 431 F.2d 183, 187-88 (2nd Cir. 1970), *cert. denied,* 401 U.S. 923 (1971); *Calderone Enterprises Corp. v. United Artists Theatre Circuit,* 454 F.2d 1292, 1295 (2nd Cir. 1971), *cert. denied,* 406 U.S. 930 (1972). Under the federal securities laws and SEC Rule 10b-5, only defrauded purchasers or sellers of securities, or at the most persons who can show injury in their capacity as investors, have been allowed to recover for violations of those laws. *Superintendent of Insurance v. Bankers Life & Casualty Co.,* 404 U.S. 6 (1971); *Birnbaum v. Newport Steel Corp.,* 193 F.2d 461 (2nd Cir. 1952), *cert. denied,* 343 U.S. 956 (1952); *Iroquois Industries, Inc. v. Syracuse China Corp.,* 417 F.2d 963 (2nd Cir. 1969), *cert. denied,* 399 U.S. 909 (1970); *Herpich v. Wallace,* 430 F.2d 792 (5th Cir. 1970); *Kahan v. Rosenstiel,* 424 F. 2d 161 (3d Cir. 1970), *cert. denied sub nom. Glen Alden Corp. v. Kahan,* 398 U.S. 950 (1970); *Simmons v. Wolfson,* 428 F.2d 455 (6th Cir. 1970), *cert. denied,* 400 U.S. 999 (1971); *Eason v. General Motors Acceptance Corp.,* C.C.H. Fed. Sec. L. Rep. (Current Transfer Binder) ¶94, 344 (7th Cir. 1973).

The First Circuit's opinion does more than ignore the foregoing authorities, which limit the injuries legally cognizable under the federal anti-trust and securities statutes. It has dispensed completely with the concept of injury, endowing the general public with an enforceable legal claim predicated solely on the presence of an alleged "inchoate interest" in BAR's financial health.*

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* Elimination of injury as a predicate was necessitated by the absence of any demonstration or theoretical exposition of injury to the public from the wrongs alleged. By the same token, had there been injury to a member of the general public cognizable under common law or statute, the novel doctrine enunciated by the court would have been unnecessary to protect his interest. As this Court pointed out in *Hawaii v. Standard Oil, supra,* citizens with cognizable injuries could sue individually or, using the procedures provided under F.R.C.P. 23, bring a class action. 405 U.S. at 266. Indeed, if there were cognizable injuries to the public, the First Circuit's decision permitting BAR to bring suit would open the way to the double recovery rejected by *Hawaii.*

The First Circuit's radical expansion of the allowable causes of action under the foregoing statutes and recognition of a new private right of action on behalf of the public was done without reference to either of the statutes, the common law, or even the Maine Public Utilities Act. Support was found instead in: (1) a presumed status of railroads as " 'public' or 'quasi-public' corporations" (App. 61); (2) Congress' recognition of the public importance of rail carriers in enacting the Transportation Act of 1920, and Section 77 of Chapter VIII of the Bankruptcy Act (App. 63); (3) expressions of concern by the ICC that the reorganization of certain railroads (not including the BAR) under Section 77 of the Bankruptcy Act "create implications of nationwide importance" (App. 64); and (4) dictum in an opinion by the Maine Supreme Judicial Court that, as of fourteen years ago, rail freight service was crucially important to the Maine economy. (App. 64-65)

It may readily be conceded that railroads are in a business affecting the public interest. Airlines, trucking companies and other common carriers affect the public interest in a similar manner and to as great a degree. So too do industrial concerns such as U.S. Steel, Boeing Aircraft, General Motors, Gulf Oil and Exxon, on whose financial health the entire economy of large communities and, indeed, the nation may depend. If the importance of a business to the public is to be sufficient grounds to recognize suits by and on behalf of the public, virtually all major corporations in the United States will be subject to such suits.

The question, however, is not the importance of railroads to the public nor the financial difficulties of many railroads today.* The right to judicial relief, as Justice Frankfurter pointed out in another context, depends upon the existence of a common law right or an interest created

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* It should be noted that no allegation was made in the complaint that BAR was in any financial difficulty.

by the Constitution or statute. *See Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 152. The question, therefore, is whether the common law or statutes have created the cause of action sued upon. Having cited none, the First Circuit was required to affirm the District Court's dismissal of the action. *See National Railroad Passenger Corp. v. National Association of Railroad Passengers*, No. 72-1289 (U.S. Sup. Ct. January 9, 1974).

Beyond the lack of a statutory or common law basis, the opinion below ignored the fact that the public interest in railroads is already protected by extensive government regulation which provides specific and limited remedies. Under Part I of the Interstate Commerce Act, 49 U.S.C. §§ 1-27, a carrier must obtain Interstate Commerce Commission approval before it extends or abandons any rail lines, 49 U.S.C. § 1(18); combines, consolidates or merges with any other carrier, 49 U.S.C. § 5(2)(a); or issues any capital stock or bond, 49 U.S.C. § 20a(2). The Act also gives the Commission the power to determine reasonable rates and charges, 49 U.S.C. § 15(1); to establish rules respecting the use of railroad cars, 49 U.S.C. § 1(14); and to require any carrier to provide adequate and safe facilities or to extend its lines in the public interest, 49 U.S.C. § 1(21). Further, the Act creates private causes of action for damages incurred by reason of acts specifically prohibited by statute. 49 U.S.C. § 8; *Atlantic Coast Line v. Riverside Mills*, 219 U.S. 186, 207-8 (1911). In addition, comparable regulation and private rights of action are provided for under the Maine Public Utilities Act.

Prior to the instant case, federal courts have deferred to Congress' regulatory scheme and have refused to create remedies that Congress withheld. Thus this Court rejected proposals that it create new private rights of action not specifically created by the statute in *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 475 (1958). *Cf. Montana Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S.

246, 254-5 (1951); *National Railroad Passenger Corp. v. National Association of Railroad Passengers, supra.* Lower courts have followed the same rule, refusing to imply private remedies against railroads beyond those enumerated in the Act. *S. H. & W. Lumber Co. v. California & Oregon Coast R. R.*, 154 F. Supp. 152 (D. Oregon 1957); *Asbury v. Chesapeake & Ohio Ry.*, 314 F. Supp. 310 (D.D.C. 1970); *National Railroad Passenger Corp. v. National Association of Railroad Passengers, supra.* The opinion below disregards these precedents.

An additional and even more fundamental fact bars creation in the instant case of a right of action premised on public injury. Nowhere in the pleadings or papers before either court below was any injury to the public alleged or specified.* The First Circuit's assumption that the acts complained of caused public injury was pure speculation, with no foundation in the record.

As pointed out in Point I, *supra*, this Court has held that conjectural or theoretical injury is insufficient to meet the constitutional requirement that those who seek to invoke the power of the federal courts must allege an actual case or controversy. *O'Shea v. Littleton, supra.* The requirement is met, the Court stated in *O'Shea*, only if the injury is "real and direct;" generalized allegations of "hypothetical" or "abstract" injury are insufficient. *O'Shea v. Littleton, id.*, at 4141.

Manifestly, the injury upon which the First Circuit premised its decision does not meet the constitutional requirements. The record is devoid of any claim of public injury, and the First Circuit's opinion itself fails to specify any public harm from the acts upon which suit is brought. On such a record, the standards laid down by this court in *O'Shea v. Littleton, supra,* and *Linda R.S. v. Richard D., supra,* require dismissal of the action.

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* Nor was the point briefed or argued.

III.

The Court of Appeals Rejected a Universally Recognized Principle Correctly Applied by The District Court.

In dismissing the instant case, the District Court followed a universally applied principle. For over seventy years, courts considering whether a corporation may maintain an action of the type here presented have looked behind the corporate form to the shareholders who would benefit from a corporate recovery. Where the shareholder had no standing to demand the relief sought from the corporation, the action has been dismissed.

The foregoing rule was first enunciated by Dean (then Commissioner) Roscoe Pound in the leading case of *Home Fire Ins. Co.* v. *Barber,* 67 Neb. 644, 93 N.W. 1024 (1903). In *Home Fire,* Dean Pound stated that in an action for corporate waste and mismanagement, the corporation had standing only as the representative of its shareholders, and held that in such an action the court must look behind the corporate form and determine whether the shareholders, the real beneficiaries, had standing to demand the relief sought. Applying the Rule, Dean Pound held that the fact that the corporation's existing shareholders had acquired their stock after the acts complained of barred the corporate claims for waste and mismanagement because a contrary result would permit the shareholders to recover monies to which they had no claim. (67 Neb. at 662-63, 93 N.W. at 1031)

The *Home Fire* case recognized two fundamental realities: (1) any injury done to a corporation through waste and mismanagement injures the stockholders who own shares at the time of the wrong, not those who purchased their shares subsequently; and (2) if stockholders, who owned no shares at the time of the acts of corporate mismanagement and waste are allowed to bring suit on such claims, the result will be the unjust enrichment of persons who suffered no injury.

The *Home Fire* rule has been followed by federal courts. In *Amen v. Black,* 234 F.2d 12 (10th Cir. 1956), a case remarkably similar to the one at bar, a corporation, through its receivers, asserted claims for recovery of the profits allegedly realized by Black, its former president, from the improper use of company funds and from the sale of corporate stock wrongfully obtained from the corporation. The court denied relief to the corporation, holding:

> "Looking at the substance of the corporate claims and the beneficiaries thereof, it becomes readily apparent that the principal beneficiary of any recovery on behalf of the corporation would be the N.C.R.A. who became the principal stockholder upon the purchase of a majority of the stock in 1947. And having purchased the stock of the corporation from Black in an arms length transaction, and having received the full value of its purchase, any recovery as stockholder beneficiary of the dissolved corporation would be tantamount to recoupment of the legitimate purchase price of the stock. Obviously there are no equities in such a result, and we therefore hold that the corporate claims must fail for lack of standing to maintain the suit and for want of equity on the part of the beneficiaries in any corporate recovery." 234 F. 2d at 23.

The rule has also been followed by every state court confronted by the question. In each case, the court dismissed the suit because it recognized that prosecution could only result in windfall profits to shareholders that had suffered no injury. *Park Terrace, Inc. v. Burge,* 249 N.C. 308, 106 S.E.2d 478 (1959); *Mathews v. Fort Valley Cotton Mills,* 179 Ga. 580, 176 S.E. 505 (1934); *State Trust & Savings Bank v. Hermosa Land & Cattle Co.,* 30 N.M. 566, 240 P. 469 (1925); *Pueblo Foundry & Machine Co. v. Lannon,* 68 Colo. 131, 187 P. 1031 (1920); *Matthews v. Headley Chocolate Co.,* 130 Md. 523, 100 A. 645 (1917); *First State Bank v. Morton,* 146 Ky. 287, 142 S.W. 694 (1912).

The reasons the rule has been so uniformly followed are easily discernible. In addition to giving effect to the basic equitable principle that courts should not be an instrument for unjust enrichment, the rule also furthers the policy of confining litigation to cases where the claimants are truly aggrieved. In this regard, the rule follows and is consistent with a policy underlying the contemporaneous share ownership requirement of Federal Rule of Civil Procedure 23.1 that federal courts will not permit themselves to be used to litigate a purchased grievance. *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 556 (1949).

Faced with the foregoing distinguished and pervasive precedents, the First Circuit did not frontally attack the rule. Agreeing that it was generally applicable, the court held that it did not apply to the instant action because of the nature of BAR's business. The court, in effect, created an exception to the rule, *viz:* that it is inapplicable where the nominal plaintiff is a corporation whose business affects the public welfare.

The exception created by the First Circuit has no precedents. It is unnecessary to go beyond the instant case to understand why this is so. It is undisputed that any corporate recovery in this action will principally benefit Amoskeag, an uninjured shareholder. Yet that is precisely the result the rule was designed to prevent. The First Circuit's exception is inconsistent with the *raison d'être* of the rule.

Indeed, it is inconsistent with the court's own opinion. The premise of the First Circuit's exception was an assumption that a public benefit in the form of better service would result from the recovery. However, the court refused to condition its ruling on the fulfillment of this premise. Conceding that it probably lacked power to prevent Amoskeag from distributing any corporate recovery to itself, thus preventing any benefit to the public, the Court specifically stated that its decision did not depend upon the devising of court imposed limitations to prevent such a

distribution. (App. 66-67) Doubtless, just such difficulties have deterred other courts from formulating the exception the First Circuit enunciated.

The decision below does more than eviscerate a hitherto universally accepted rule and principle, however. It also throws into question the continued efficacy of the contemporaneous share ownership requirement of Rule 23.1 of the Federal Rules of Civil Procedure. By its terms, Rule 23.1 would bar a shareholder action brought directly by Amoskeag, since Amoskeag cannot allege that it was a shareholder at the time the alleged illegal acts occurred. The First Circuit's decision permits Amoskeag and other litigants to evade the Rule's restrictions by the simple device of causing the action to be brought in the corporate name.

Such a result conflicts with prior decisions of this Court which have consistently held that federal jurisdictional limitations cannot be evaded by use of a nominal plaintiff. On this principle, this Court has dismissed actions nominally brought by states where examination of the record disclosed that the real parties in interest were citizens barred from bringing suit by the eleventh amendment. *New Hampshire v. Louisiana,* 108 U.S. 76, 88-9 (1883); *Poindexter v. Greenhow,* 114 U.S. 270, 287 (1885); *In re Ayers,* 123 U.S. 443, 490 (1887). On the same principle, this Court has dismissed actions nominally brought by corporations where the real parties in interest were individuals barred by the diversity requirements of article III of the Constitution. *Miller & Lux v. East Side Canal Co.,* 211 U.S. 293 (1908); *Southern Realty Co. v. Walker,* 211 U.S. 603 (1909). The doctrine enunciated by these cases is that access to the federal courts is to be governed by the identity of the real parties in interest, rather than the parties of record.

The First Circuit ignored this principle in permitting Amoskeag to bring an action otherwise barred through the device of utilizing the corporation as the party of

record. The decision below thus not only negates the universally accepted *Home Fire* rule, but disregards basic doctrine that previously has governed all questions of access to the federal courts.

Conclusion

The order of the Court of Appeals for the First Circuit should be reversed, and the order of the District Court for the District of Maine reinstated.

Respectfully submitted,

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APPENDIX

Statutes and Regulations Involved

1. United States Constitution art. III § 2 reads in pertinent part as follows:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

2. United States Constitution amend. XI reads as follows:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

3. Clayton Act § 10, 15 U.S.C. § 20, reads in pertinent part as follows:

> No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such

other corporation, firm, partnership, or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors, and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

4. Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b), reads as follows:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

5. SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, reads as follows:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

6. Interstate Commerce Act, Part I, § 1(14), 49 U.S.C. § 1(14), reads in pertinent part as follows:

(a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. • • •

7. Interstate Commerce Act, Part I, § 1(18), 49 U.S.C. § 1(18), reads as follows:

No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or

construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

8. Interstate Commerce Act, Part I, § 1(21), 49 U.S.C. § 1(21), reads as follows:

The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this chapter, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this chapter, and to extend its line or lines: • • •

9. Interstate Commerce Act, Part I, § 5(2)(a), 49 U.S.C. § 5(2)(a), reads as follows:

It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract

to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

10. Interestate Commerce Act, Part I, § 8, 49 U.S.C. § 8 reads as follows:

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

11. Interstate Commerce Act, Part I, § 15(1), 49 U.S.C. § 15(1), reads as follows:

Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative,

either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed.

12. Interstate Commerce Act, Part I, § 20a(2), 49 U.S.C. § 20a(2), reads as follows:

It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of

interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose: *Provided,* That nothing in this section is to be construed as applying to securities issued or obligations or liabilities assumed by the United States or any instrumentality thereof, or by the District of Columbia or any instrumentality thereof, or by any State of the United States, or by any political subdivision or municipal corporation of any State, or by any instrumentality of one or more States, political subdivisions thereof, or municipal corporations.

13. Maine Public Utilities Act § 104, 35 M.R.S.A. § 104, reads as follows:

> No public utility doing business in this State shall extend credit or make loans to or make any contract or arrangement, providing for the furnishing of manage-

ment, supervision of construction, engineering, accounting, legal, financial or similar services, or for the furnishing of any service other than those enumerated, with any corporation, person, partnership or trust, holding, controlling or owning in excess of 25% of the voting capital stock of such public utility, or with any other corporation which is itself owned or controlled by or affiliated with any corporation, person, partnership or trust, holding, controlling or owning a majority of the voting capital stock of such public utility, unless and until such contract or arrangement shall have been found by the commission not to be adverse to the public interest and shall have received their written approval. The commission shall in the case of any utility have the power to exempt herefrom, from time to time, such classes of transactions as it may specify in writing in advance and which in its judgment will not affect the public interest.

14. Federal Rule of Civil Procedure 23.1 reads as follows:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or com-

parable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.